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No. 04-495

Supreme Court, U.S.
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In The
Supreme Court of the United States

REGINALD WILKINSON, et al.,

Petitioners,

v.

CHARLES E. AUSTIN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

When it is established that confinement at a super-maximum security prison imposes an "atypical and significant hardship" on those imprisoned there, thus giving rise to a constitutionally-protected liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995), is it appropriate in determining what process is due to weigh private and public interests and the risk of error pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

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REASONS FOR DENYING THE WRIT

I. PETITIONERS INCLUDE IN THE APPENDIX THE WRONG VERSION OF THE PROCEDURAL REQUIREMENTS AT ISSUE, AND MISSTATE CRUCIAL FACTS FOUND BY THE COURTS BELOW[1]

A. Petitioners Include In The Appendix The Wrong Version Of The Procedural Requirements At Issue

Petitioners state: "The procedure for classifying inmates as Level 5 is contained in ODRC Policy 111-07, issued January 3, 2002." Petition at 6. This is error. As explained by the Court of Appeals:

> [T]he case was scheduled for trial in January 2002. On the eve of trial, the ODRC released a new version of 111-07 ("new 111-07"), and it is the district court's ordered modifications to new 111-07, made after a bench trial, that are at issue on this appeal.

App. 5a.

Thus, the procedures at issue on this appeal are contained in Petitioners' Policy 111-07 as modified by the District Court after trial and post-trial briefing. But the version of ODRC Policy 111-07 which appears in the Appendix as Appendix E, App. 122a-144a, is the policy "Issued January 3, 2002," before trial, not the policy as modified by the District Court pursuant to its Orders of

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[1] See Supreme Court Rules 14.5 and 15.2.

March 26, 2002 (Appendix C) and May 15, 2002 (Appendix B).[2]

Nowhere in Petitioners' papers will this Court find the procedures it is being asked to assess.

B. Petitioners Misstate Crucial Facts Found By The Courts Below

Petitioners' "Statement of the Case" contains misstatements as to both procedure and substance.

1. Procedure

Petitioners' error in providing this Court with a set of procedures not on appeal, and omitting the procedures actually at issue, leads to a series of misstatements in Petitioners' Statement of the Case. Among these misstatements are the following:

The current procedure for classifying inmates as Level 5 is not "contained in ODRC Policy 111-07, issued January 3, 2002." Petition at 6.

The events alleged by Petitioners at 6 to "trigger" the placement of a prisoner in supermaximum security – a finding by a Rules Infraction Board or a conviction for a new crime committed while in prison – are nowhere

[2] The policy that appears on the internet at http://156.63.250.98 as 53-CLS-04 incorporates the modifications required by the District Court. 53-CLS-04 "supersedes: 111-07 dated 5/22/02" in the sense that it gives that policy a new number, but is substantively identical with Policy 111-07 dated May 22, 2002, not with Policy 111-07 dated January 3, 2002.

mentioned in cited section VI(C) of Policy 111-07, which is reproduced at App. 127a-130a.

Procedures for "Placement in Level 5," App. 127a-130a, do not include preparation of a written report that broadly reviews the inmate's characteristics and conduct, nor is "age" or "time remaining on sentence" listed among the placement criteria, as indicated in the Petition at 6-7.

In their Petition at 7-8, Petitioners cite "Security Designation (Long Form), App. 144a," "Notice of Hearing Form, App. 144a," "Classification Committee Report Form, App. 144a," and "Privilege/Security Level Review Form, App. 144a," but no such forms appear at App. 144a.[3]

The Petition states at 7 that the classification committee makes a recommendation to the Warden "that includes a narrative description of 'the nature of the threat the inmate presents and the committee's reasons for the recommendation.'" However, the quoted words nowhere appear in the cited pages of Policy 111-07 at App. 127[a]-130a.

In describing the process for evaluating whether a prisoner should be retained at the Ohio State Penitentiary, Petitioners state that the first factor considered is "the prisoner's underlying criminal offense." Petition at 7. In fact, this factor is not among the eighteen (18) factors listed in the version of Policy 111-07 contained in the Appendix at 138a-139a (nor in Policy 111-07 as modified by the District Court).

[3] See App. 144a: "(Petitioner's Note: forms associated with this policy were omitted; see R., Def. Ex. C.)"

2. Substance

In Section A of Petitioners' Statement of the Case, Petitioners conclude: "The usual stay at OSP [Ohio State Penitentiary] is at least a year." Petition at 5. This statement is misleading. What the District Court actually found as fact was:

> The vast majority of inmates placed at the OSP will remain for a minimum of two years, with only an annual review of their status. To date [February 2002], two hundred OSP prisoners have been there for more than three years.

App. 90a. The trial court also observed:

> Even with good behavior, inmates at OSP serve indefinite terms at the institution. With the exception of the end of their sentences, there is no other indication of how long an individual inmate will be kept at the institution.

App. 91a.

Section C of Petitioners' Statement of the Case, entitled "The proceedings below," and Petitioners' "Question Presented," are not based on what the Court of Appeals found.

Petitioners state that plaintiffs "claim" that "they have a liberty interest in staying out of supermax," Petition at 8. However, Petitioners do not appeal this holding of the courts below and must be understood no longer to contest it.

Petitioners state that a majority of the Court of Appeals held that "all deprivations significant enough to implicate a liberty interest under *Sandin v. Conner*, 515

U.S. 472 (1995) are serious enough to create a presumption that *Wolff*-type procedures are necessary." Petition at 10, citing App. 23a. There is no mention of *Wolff v. McDonnell*, 418 U.S. 539 (1974), on the cited page of the opinion of the court below.

In their Question Presented, Petitioners represent that this is a case in which "prison regulations create a liberty interest for the prisoner in avoiding [supermaximum security] placement." In fact, the Court of Appeals found that a liberty interest was created because placement at "OSP constitutes an atypical and significant hardship under *Sandin*." App. 14a. This error, ignoring the balancing of harm to the prisoner against the interests of the state, infuses Petitioners' whole approach.

Petitioners concede that all three members of the court of appeals panel called "for an independent vetting of Ohio's process under the formula set in *Mathews v. Eldridge*, 424 U.S. 319 (1976)." Petition at 10. Nevertheless, as Respondents show below, this does not prevent Petitioners from inaccurately alleging that the Court of Appeals opted for *Wolff* rather than *Hewitt v. Helms*, 459 U.S. 460 (1983). Respondents will proceed to demonstrate that what the Court of Appeals actually did was to reject a methodology of mechanically choosing between *Wolff* and *Hewitt* on the basis of the purported nature of the decision involved, instead advocating the interest-balancing methodology of *Mathews v. Eldridge*.

II. PETITIONERS MISREPRESENT THE ANALYSIS AND HOLDING OF THE COURT OF APPEALS

Petitioners assert that the Court of Appeals followed the Ninth Circuit in requiring "*Wolff*-type proceedings,"

bringing the Sixth and Ninth Circuits into conflict with the Third, Eighth and D.C. Circuits. Petition at 8-10, 11-19, especially 17.

Petitioners misrepresent the analysis and holding of the court below.

First, it should be noted that in their petition to this Court, Petitioners no longer contest the finding of the District Court, affirmed by the Sixth Circuit, that confinement at the Ohio State Penitentiary imposes an atypical and significant hardship, and thereby gives rise to a constitutionally-protected liberty interest. See *Austin v. Wilkinson*, 189 F. Supp.2d 719, 737-742 (N.D. Ohio 2002), *aff'd in part and rev'd in part*, 372 F.3d 346, 353-355 (6th Cir. 2004); App. 9a-15a, 85a-90a. The sole concern of the Petition for Certiorari is: a liberty interest having been established, what process is due?

Second, in summarily assigning the court below to a putative group of circuit courts of appeal that follow *Wolff* rather than *Hewitt*, Petitioners disregard the plain statement of all members of the circuit court panel that what they termed the "*Hewitt/Wolff* dichotomy" is "not a viable form of analysis." App. 19a n.10. The burden of placement or retention for an indefinite period of years in a supermaximum security prison is far weightier than the burdens at issue in either *Wolff* or *Hewitt*. The court below insisted that the District Court correctly began its analysis by weighing the interests at stake pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976), rather than by focusing on whether a given decision was retrospective and disciplinary or prospective and administrative. App. 18a-24a.

The opinion below emphasized that Petitioners, both in their brief and at oral argument, identified as most

burdensome the procedure mandated by the District Court "requiring officials to limit their placement decision to only those matters detailed in the notice given to the inmate." App. 23a. The opinion went on to find this requirement appropriate in view of the fact that Petitioners' own policy limits the state's discretion in placing or retaining prisoners at the OSP by specifying "certain factual predicates, all of which are historical in nature." *Id.* Then, having found that the additional procedural requirement identified by the state as most burdensome "passes muster under *Mathews v. Eldridge*," the court below concluded that procedures imposing a lesser burden than notice are also appropriate. App. 24a.

In sum, what the court below did was to analyze the specific facts established at trial of this case pursuant to the three-part test set forth in *Mathews v. Eldridge*, and to hold that the procedural requirements mandated by the District Court were appropriate in light of this analysis. This is not following *Wolff* rather than *Hewitt*. As the Sixth Circuit explicitly stated, this is rejecting the *Wolff/Hewitt* dichotomy and instead assessing particular procedures required when the *Mathews* factors are applied to a specific set of facts.

III. THE RELIANCE OF THE COURTS BELOW ON *MATHEWS V. ELDRIDGE* IS CONSISTENT WITH THE DECISION OF THIS COURT IN *HEWITT V. HELMS*

Petitioners claim that the use of the *Mathews* balancing test by the District Court and the Court of Appeals is inconsistent with this Court's decision in *Hewitt*. On the contrary, the Supreme Court in *Hewitt* also applied the *Mathews* balancing test. 459 U.S. at 473-474. What made

the result below different is that the factual record here is different than the factual record in *Hewitt*.

In contrast to the short-term administrative segregation experienced by the plaintiff prisoner in *Hewitt*, the class of plaintiff prisoners in *Austin* were placed in the supermax and denied the opportunity for either transfer or parole, not for weeks, but for an indefinite term of years. Moreover here, in contrast to *Hewitt*, the courts below relied on a record demonstrating a substantial risk of erroneous decision-making.

The courts below in this case applied the same balancing test used in *Hewitt* to a dramatically different set of facts. *Hewitt* itself began by noting that the "requirements imposed by the [Due Process] Clause are, of course, flexible and variable dependent upon the particular situation being examined." 459 U.S. at 472. Because the administrative segregation at issue in *Hewitt* was short-term (during investigation to determine whether there was probable cause that would lead to a disciplinary hearing), did not carry a stigma (of having engaged in serious misconduct), and would not have any significant effect on the prisoner's parole opportunities, the Court found that the prisoner's private interest in being free from administrative segregation was "not one of great consequence." *Id.* at 473, 476. Here the facts are dramatically different: the conditions of confinement impose an atypical and significant hardship, the segregation is long-term after a finding of serious misconduct, and parole is irrebuttably prohibited for as long as the prisoner is incarcerated at the Ohio State Penitentiary. Because of the factual differences between the Ohio State Penitentiary case and the unusual circumstances affecting the individual in *Hewitt*, the District

Court and the Court of Appeals reached a different conclusion here.

IV. NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL EXISTS ON THE ISSUE DECIDED BY THE COURT OF APPEALS

Petitioners claim that the Third, Eighth and D.C. circuits have decided, contrary to the Ninth and Sixth circuits, that *Sandin*'s new framework for analysis leaves unaffected the concept that the minimal due process protections set forth in *Hewitt* are sufficient for all administrative placement decisions.

We have shown above that this argument misrepresents what the courts below held in the present case (*supra*, II), and what this Court held in *Hewitt* (*supra*, III). Petitioners have also misstated the positions of other circuit courts of appeal.

The Sixth Circuit Court of Appeals in this case addressed the question whether

> *Sandin* called into question not only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic way in which they applied the *Hewitt/Wolff* dichotomy. After *Sandin*, both steps of the analysis – the creation of a liberty interest and the determination of the process due to protect that interest – must carefully reference the severity of the deprivation at stake.

App. 18a.[4]

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[4] The Court in *Sandin* abandoned "*Hewitt*'s methodology" without overruling the holding in *Hewitt*. "Our decision [in *Sandin*] only

(Continued on following page)

Even a cursory reading of the cases cited by Petitioners show that most were decided prior to *Sandin*. There was no way such a case could evaluate the impact of a case not yet decided.

For example, *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985), cited by Petitioners, was decided almost a decade before this Court decided *Sandin*. To demonstrate that a conflict exists among the circuits after *Sandin*, Petitioners have to show that the Eighth Circuit still maintains its position in *Clark*. They cite no authority in support of that proposition.

So too, of the two D.C. Circuit cases cited by Petitioners, one, *Crosby-Bey v. District of Columbia*, 786 F.2d 1182 (D.C. Cir. 1986), predates *Sandin* and therefore could not have addressed the issue that *Sandin* decided. The other, *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997), was a post-*Sandin* case in which the court never determined whether the prisoner there had a liberty interest and therefore never had to face the issue of whether the determination that an atypical and significant hardship exists affects the determination of the amount of process due. The *Brown* court noted: "If Brown had shown that the Housing Board's finding that he had assaulted a guard was treated for parole or other purposes as equivalent to a disciplinary finding to this effect, . . . this might indicate that more extensive procedural protections were warranted." *Id.*, 131 F.3d at 171 n.8. And in another administrative segregation case two years after *Brown*, *Hatch v. District of Columbia*,

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abandons an approach that in practice is difficult to administer and which produces anomalous results." 515 U.S. at 483 n.5.

184 F.3d 846 (D.C. Cir. 1999), the Circuit expressly recognized that it had not decided whether *Hewitt* or *Wolff* protections apply once a liberty interest is held to exist, stating that it "need not decide the applicability of *Wolff*" because the prisoner plaintiff had not received the process due under *Hewitt*. *Id.*, 184 F.3d at 852.

Similarly, the Third Circuit's decision in *Mims v. Shapp*, 744 F.2d 946 (3rd Cir. 1984), was pre-*Sandin*, and its post-*Sandin* decision in *Shoats v. Horn*, 213 F.3d 140 (3rd Cir. 2000), never squarely faced the question raised here of whether *Sandin* "called into question . . . the mechanistic fashion in which [the circuit courts] applied the *Hewitt*/*Wolff* dichotomy." App. 18a. The Third Circuit found that a post-*Sandin* liberty interest existed and then applied the *Hewitt* procedural analysis. But Shoats apparently never argued that *Hewitt* procedures were inadequate. Rather, he contended that his continued long-term confinement in administrative segregation was based solely on his past criminal history and on the purported bias of the decision-maker, arguments the Circuit rejected. *Id.*, 213 F.3d at 146. The Third Circuit nowhere discussed the question that the Sixth Circuit decided, namely, whether *Sandin* requires changing the mechanistic application of the *Hewitt*/*Wolff* dichotomy as to what process is due.

The only other circuit to address the issue with which the Sixth Circuit grappled here is *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996). It did so in cursory fashion, simply noting the statement in *Sandin* that "the time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum*." *Id.* at 1089, quoting *Sandin*, 515 U.S. at 483.

There is a reason for the paucity of circuit court decisions on the issue decided by the circuit court in this case: *Sandin*'s focus on the severity of the deprivation has dramatically reduced the number of cases in which prisoners have established a liberty interest. *Sandin* emphasized the severity of deprivation because this Court was concerned to avoid cases based on state regulations where prisoners claimed a liberty interest in "receiving a tray lunch rather than a sack lunch" or "receiving a paperback dictionary." 515 U.S. at 483.

The decision below appears to be the first to have found a liberty interest for all prisoners confined in a supermaximum security prison and, as is conceded by Petitioners, such confinement imposes an atypical and significant hardship giving rise to a constitutionally-protected liberty interest for all imprisoned there. "Any liberty interest which passes *Sandin*'s threshold," the Sixth Circuit concluded, "comes with a higher presumption of process due than those which may have been found pre-*Sandin*." App. 22a n.12.

No circuit court of appeals other than the Sixth Circuit has thus far clearly addressed the question presented here. This Court need not do so now.

V. THE COURTS BELOW REASONABLY BALANCED THE COMPETING INTERESTS SET FORTH IN *MATHEWS V. ELDRIDGE* BASED ON THE EXTENSIVE FACTUAL RECORD AT TRIAL

The Court of Appeals reasonably balanced the three factors outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), based on an extensive and detailed trial record.

The balancing test articulated in *Mathews* has three components: the private interest, the risk of erroneous deprivation of such interest, and the Government's interest.[5]

The first element is "the private interest that will be affected by the official action." 424 U.S. at 335; App. 19a. The Court of Appeals considered that

> placement at OSP is indefinite and reviewed only annually. . . . Prisoners placed at OSP are deprived of all significant human contact and have other restrictions placed upon their movement and their personal privileges; they are also ineligible for parole during their stay at OSP.

App. 21a; see also the Court of Appeals' summary of the District Court's findings at 10a. As to this first of the

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[5] *Wolff* preceded and foreshadowed the *Mathews v. Eldridge* balancing test which the Sixth Circuit followed. According to *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974):

> We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v McElroy, 367 US at 895, 6 L Ed 2d 1230. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Ibid.; Morrissey, 408 US, at 481, 33 L Ed 2d 484, 92 S Ct 2593.

And, at 567, *Wolff* states, "Rules of procedure may be shaped by consideration of the risks of error, [citations omitted], and should also be shaped by the consequences which will follow their adoption." While not referring to *Mathews*, the Supreme Court in *Vitek v. Jones*, 445 U.S. 480 (1980) found that the District Court had properly identified and weighed the relevant factors: the interest of the State, the interest of the prisoner, and the risk of error.

Mathews factors, the Court of Appeals found the private interest at stake in this case "significant." App. 21a.

The second *Mathews* factor is "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335; App. 19a. Here the Court of Appeals found that "the district court made specific findings concerning past erroneous and haphazard placements at OSP, which go unchallenged on appeal." App. 22a. "[I]n the face of the substantial factual findings of the district court as to haphazard ODRC placements," the Court of Appeals determined, "the procedural requirement of notice is particularly important"; accordingly it gave "great weight to its [the notice requirement's] value in increasing accuracy." App. 19a-20a n.11.

The final *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335; App. 19a. Regarding this final component of the test, the court below emphasized that Petitioners were seeking to have it both ways:

> Having set out a detailed and restricted list of reasons why inmates can be put at OSP, the ODRC cannot turn around and argue that the district court's order decreases their ability to rely on "rumor, reputation, and even more imponderable factors," for those factors are illegitimate under their own placement scheme.

App. 23a. The Court of Appeals reasonably concluded "that many of the procedures ordered by the district court are

an attempt to reconcile an elaborate administrative appeals scheme created by the ODRC Officials with the requirement that the inmate know the reason for any decision made about his fate. . . . " App. 24a.

The Court of Appeals recognized that the type of decision being made will be a "factor" in a court's decisions. App. 19a-20a n.11. But, as explained by the Court of Appeals below, at App. 18a-19a,

> It is not enough to say that a particular decision is "forward-looking"; instead, reference must be made to the interests at stake, for the inmate and for the state. It is not the nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance.

Nothing in the decisions of the courts below require this Court's intervention.

CONCLUSION

For the above-stated reasons, Respondents urge this honorable Court to deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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